Supreme Court, U.S.
FILED
APR 26 1998
OFFICE OF THE CLERK

No. 98-1721

In The

Supreme Court of the United States

October Term, 1998

DAVID B. COURTWAY, WARREN C. CURT, HELEN COLLINS, BARABARA HARRISON, CHERYL REAVIS, MARVIN FORMAN, CONNIE SHERRILL, CAROL MURPHY, MARGUERITE LYON, BOBBIE RICHARDSON, BRENDA M. SWAIN, RODNEY CLAYTON, PAT CATANZARO, SHERRI DURK, SUE COCHRAN, GERARD SCHMIDT, WILLIAM L. WRIGHT, DOROTHY STUEBBEN, NEIL FISCHER, NEIL UMFLEET, DOROTHY KINKAID, VERNON F. SCHMIDT, STEPHEN D. HOLST, ROBERT MOONEY, JOAN TOMPKINS, DONALD CRANE, LINDA CRANE, THOMAS HAMMACK, JAN HAMMACK, KIRBY CRISP, NORAH E. RINGO, LETHA BECK, RUBY MANSON, WILLIAM NICHOLS, BILL HAAG, JR., JOHN KLEBBA, EDGIL PREWITT, JOHN SAYRE, JAKE SLAYTON, JAMES B. CHAPPELL, ROSE MARY WILLIAMS, MELVIN TULL, DUANE HEFNER, JAN METZ, GIL KENNON, ED WOLFE, ELLEN MOORE, BETTY WILLIAMS, DENISE FUNDERBURK, WENDELL CULLY, LORENE REINSCH, MARY ANN KALLASH, SHARON JAMES, GERALDEAN THORNSBERRY, AND EDWIN L. HARRIS,

Petitioners,

vs.

MEL CARNAHAN and JANETTE M. LOHMAN,

Respondents.

On Petition For Writ Of Certiorari
To The Missouri Court Of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

LEO V. GARVIN, JR.
GARVIN & MALONEY
7700 Bonhomme Avenue
Suite 450
St. Louis, Missouri 63105
(314) 725-1135

Counsel of Record

PAUL M. MALONEY
ELKIN L. KISTNER
7700 Bonhomme Avenue
Suite 450
St. Louis, Missouri 63105
(314) 727-0777

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7888

QUESTION PRESENTED

Whether the First and Fourteenth Amendment freedoms of speech and assembly protect independent contractor fee agents of the Missouri Department of Revenue from the termination of their contracts solely on partisan political grounds, when the statutory duties of the fee agents are non-policy making and ministerial.

LIST OF PARTIES

The parties to the proceedings below were petitioners David B. Courtway, Warren C. Curt, Helen Collins, Barbara Harrison, Cheryl Reavis, Marvin Forman, Connie Sherrill, Carol Murphy, Marguerite Lyon, Bobbie Richardson, Brenda M. Swain, Rodney Clayton, Pat Catanzaro, Sherri Durk, Sue Cochran, Gerard Schmidt, William L. Wright, Dorothy Stuebben, Neil Fischer, Neil Umfleet, Dorothy Kincaid, Vernon F. Schmidt, Stephen D. Holst, Robert Mooney, Joan Tompkins, Donald Crane, Linda Crane, Thomas Hammack, Jan Hammack, Kirby Crisp, Norah E. Ringo, Letha Beck, Ruby Manson, William Nichols, Bill Haag, Jr., John Klebba, Edgil Prewitt, John Sayre, Jake Slayton, James B. Chappell, Rose Mary Williams, Melvin Tull, Duane Hefner, Jan Metz, Gil Kennon, Ed Wolfe, Ellen Moore, Betty Williams, Denise Funderburk, Wendell Cully, Lorene Reinsch, Mary Ann Kallash, Sharon James, Geraldean Thornsberry, and Edwin L. Harris; and respondents Mel Carnahan and Janette M. Lohman.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

I. THE MISSOURI COURT OF APPEALS DECISION THAT POLITICAL AFFILIATION IS AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF THE DUTIES OF INDEPENDENT CONTRACTOR FEE AGENTS OF THE MISSOURI DEPARTMENT OF REVENUE, WHEN THE STATUTORY DUTIES OF THE FEE AGENTS ARE NON-POLICY MAKING AND MINISTERIAL, WAS ERRONEOUS AND IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN *ELROD VS. BURNS*, 427 U.S. 347, 96 S.CT. 2673, 49 L.ED.2D 547 (1976); *BRANTI VS. FINKEL*, 445 U.S. 507, 100 S.CT. 1287, 63 L.ED.2D 574 (1980); *RUTAN VS. REPUBLICAN PARTY OF ILLINOIS*, 497 U.S. 62, 110 S.CT. 2729, 111 L.ED.2D 52 (1990); AND *O'HARE TRUCK SERVICE, INC. VS. CITY OF NORTHLAKE*, 518 U.S. 712, 116 S.CT. 2353, 135 L.ED.2D 874 (1996), BECAUSE NO VITAL GOVERNMENT END EXISTS WHICH WOULD OVERRIDE THE FEE AGENTS' FIRST AND FOURTEENTH AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND ASSEMBLY, AND BECAUSE POLITICAL PARTY AFFILIATION IS NOT AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF THE STATUTORY DUTIES OF THE FEE AGENTS 4

TABLE OF CONTENTS – Continued

Page

CONCLUSION 13

APPENDIX

Opinion of the Missouri Court of Appeals dated June 23, 1998.....App. 1

Order of the Missouri Court of Appeals readopting and entering opinion on January 25, 1999 .....App. 13

Judgment of the Circuit Court of Cole County, Missouri .....App. 15

Notice of Appeal .....App. 35

May 27, 1997, Order transferring case to Missouri Court of Appeals.....App. 39

July 28, 1998, Order overruling petitioners' Motion for Rehearing.....App. 40

September 22, 1998, accepting petitioners' Application for Transfer to the Missouri Supreme Court .....App. 41

January 19, 1999, Order retransferring case back to Missouri Court of Appeals .....App. 43

First Amendment to the United States Constitution .....App. 44

Fourteenth Amendment to the United States Constitution.....App. 44

Section 136.055 Revised Statutes of Missouri (1994) .....App. 45

Petition in the Circuit Court of Cole County, Missouri .....App. 46

Amendment by Interlineation to Petition adding Mel Carnahan as party defendant.....App. 58

Amendment by Interlineation to Petition adding Janette M. Lohman as party defendant.....App. 59

TABLE OF AUTHORITIES

Page

CASES:

Branti vs. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) 4, 5, 6, 7, 11

Elrod vs. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) 4, 5, 11

O'Hare Truck Service vs. City of Northlake, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996) 4, 5, 6, 11

Rutan vs. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) .. 4, 5, 7, 11, 12

State ex rel. Filkey vs. Scott, 407 S.W.2d 79 (Mo.App. 1965) 10

State ex rel. Mitchell vs. City of Sikeston, 555 S.W.2d 281 (Mo. *en banc*, 1977) 9

Sweeney vs. Bond, 519 F.Supp. 124 (E.D.Mo. 1981), *aff'd*, 669 F.2d 542 (8th Cir. 1982), *cert. den.*, 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982) 9

Trenton Trust Company vs. Western Surety Company, 599 S.W.2d 481 (Mo. 1980) 9

Union Electric Company vs. Public Service Commission, 591 S.W.2d 134 (Mo.App. 1979) 9

STATUTES:

Section 136.055 Rev.Stat.Mo. (1994) 2, 7, 8, 9, 10

CONSTITUTIONAL PROVISIONS:

First Amendment to the United States Constitution 2, 6, 7, 11

Fourteenth Amendment to the United States Constitution 2

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Western District, entered in the above-entitled proceeding on January 25, 1999.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District, has been reported at 985 S.W.2d 350 (Mo.App. 1999). It is reprinted in the Appendix, at App. 1-10, infra.

JURISDICTION

The judgment of the Missouri Court of Appeals, Western District, was entered on January 25, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

STATEMENT OF THE CASE

Petitioners instituted this action in the Circuit Court of Cole County, Missouri, to prevent the termination of their contracts as fee agents of the Department of Revenue, on the basis of petitioners' political affiliation or on political patronage grounds, following the election of Mel Carnahan as Governor of the State of Missouri in November, 1992. (App. 37)

Petitioners claimed that the termination of their contracts on the basis of their political affiliation or on political patronage grounds would violate Article I, Sections 8 and 9 of the Constitution of the State of Missouri and the First and Fourteenth Amendments to the United States Constitution. (App. 37-47)

The trial court entered a judgment in favor of respondents, and specifically found that "political affiliation is an appropriate requirement for the effective performance of the duties" of fee agents. (App. 29)

Petitioners appealed to the Supreme Court of Missouri on the basis that the case involved constitutional issues. On May 27, 1997, the Supreme Court transferred the case to the Missouri Court of Appeals, Western District, pursuant to Article V, Section 11 of the Constitution of the State of Missouri. On June 23, 1998, the Court of Appeals entered its opinion affirming the judgment of the trial court, but acknowledged that *political affiliation would not be an appropriate requirement for the effective performance of the duties of a fee agent, if the fee agent's duties were restricted to the duties enumerated in the statute which created the office,* Section 136.055 Missouri Revised Statutes. (App. 6)

Petitioners' Motion for Reconsideration and/or Transfer to the Supreme Court was denied on July 28, 1998. (App. 34)

On August 12, 1998, petitioners filed an Application for Transfer to the Supreme Court of Missouri. The Application for Transfer was granted on September 22, 1998. (App. 35)

On January 19, 1999, the Supreme Court of Missouri retransferred the case back to the Missouri Court of Appeals, Western District. (App. 37)

On January 25, 1999, the Missouri Court of Appeals, Western District, readopted and entered as its opinion the earlier opinion dated June 23, 1998. (App. 11)

REASONS FOR GRANTING THE WRIT

I. THE MISSOURI COURT OF APPEALS DECISION THAT POLITICAL AFFILIATION IS AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF THE DUTIES OF INDEPENDENT CONTRACTOR FEE AGENTS OF THE MISSOURI DEPARTMENT OF REVENUE, WHEN THE STATUTORY DUTIES OF THE FEE AGENTS ARE NON-POLICY MAKING AND MINISTERIAL, WAS ERRONEOUS AND IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN *ELROD VS. BURNS*, 427 U.S. 347, 96 S.CT. 2673, 49 L.ED.2D 547 (1976); *BRANTI VS. FINKEL*, 445 U.S. 507, 100 S.CT. 1287, 63 L.ED.2D 574 (1980); *RUTAN VS. REPUBLICAN PARTY OF ILLINOIS*, 497 U.S. 62, 110 S.CT. 2729, 111 L.ED.2D 52 (1990); AND *O'HARE TRUCK SERVICE, INC. VS. CITY OF NORTHLAKE*, 518 U.S. 712, 116 S.CT. 2353, 135 L.ED.2D 874 (1996), BECAUSE NO VITAL GOVERNMENT END EXISTS WHICH WOULD OVERRIDE THE FEE AGENTS' FIRST AND FOURTEENTH AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND ASSEMBLY, AND BECAUSE POLITICAL PARTY AFFILIATION IS NOT AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF THE STATUTORY DUTIES OF THE FEE AGENTS.

1. Historical evolution of the constitutional protection from dismissal on partisan political grounds.

In *Elrod vs. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), this Court held that the dismissal of government employees for partisan political reasons violates the First Amendment to the United States Constitution as a deprivation of the individual's rights of free

speech and assembly. The only employees excepted from this constitutional protection were "policy-making" and confidential employees. 427 U.S. at 367; 96 S.Ct. 2687.

In *Branti vs. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), a majority of this Court reaffirmed the holding in *Elrod*, and held that dismissals were only proper when the government is able to demonstrate overriding governmental interests of vital importance.

> "Unless the Government can demonstrate an 'overriding interest', of 'vital importance' requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment." (emphasis added)

445 U.S. at 516-17; 100 S.Ct. at 1293. The Court further noted that the governmental interests could be adequately protected if dismissals were permitted when political party affiliation is an appropriate requirement for effective job performance. 445 U.S. at 518.

In 1990, this Court extended the constitutional protection from dismissal or termination on partisan political grounds to non-employees (job applicants) in *Rutan vs. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990).

Finally, in 1996, this Court extended the constitutional protection from dismissal on partisan political grounds to independent contractors, in *O'Hare Truck Service, Inc. vs. City of Northlake*, 516 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996). The Missouri Court of Appeals found that the termination of petitioners' contracts were

"patronage dismissals" within the meaning of the standards set forth in *O'Hare*. *O'Hare* left the *Branti* standards intact, however, so that petitioners' dismissals should only properly withstand judicial scrutiny if (1) the government is able to demonstrate an "overriding governmental interest" of sufficient importance that it overrides petitioners' First Amendment rights; *and* (2) the government is able to demonstrate that political party affiliation is an appropriate requirement for the effective performance of a fee agent's duties. Petitioners submit that the government failed to meet its burden under either part of the *Branti* standards, for the following reasons.

2. The government failed to demonstrate a *governmental* end, or interest, of sufficient importance to override petitioners' First Amendment rights.

Respondents offered ample evidence of the incumbent *Governor's interests* which are served by overriding petitioners' First Amendment rights, but totally failed to show that any *governmental* interests exist which would be so served. The 1980s cases relied upon by respondents, and cited by the Missouri Court of Appeals, clearly recognized the *political* value of the fee agent positions to an incumbent administration. No *governmental* interest is served, however, by requiring that the fee agents belong to the same political party as the Governor. The political welfare of an incumbent Governor should not override a citizen's First Amendment rights of freedom of speech and assembly.

There is no contention that an individual's political party affiliation makes him or her better able to sell motor vehicle licenses and collect motor vehicle sales and use taxes. Petitioners perform the identical functions in the independent fee offices as their government-employee counterparts in the state revenue offices. The fee agent's tasks are ministerial. There is no contention that the fee agents enjoy a confidential relationship with the Governor. They are not involved in policy making. Generally, a government should be able to meet its need for politically loyal employees by dismissing, on political grounds, only those employees in policy making positions. *Rutan, supra;* 110 S.Ct. 2729, at 2734. The Missouri Court of Appeals decision does not point to any governmental interest that is served by requiring the fee agents to belong to the political party of the Governor. The termination of petitioners' contracts therefore fails to meet the first part of the *Branti* standard, and should be reversed.

3. Political affiliation is not an appropriate requirement for the effective performance of the statutory duties of a fee agent.

Assuming, *arguendo,* that some governmental interest could be found which would justify consideration of overriding petitioners' First Amendment rights, the termination of petitioners' contracts would fail the second part of the *Branti* test, because political affiliation is not an appropriate requirement for the effective performance of the duties of a fee agent. Section 136.055 Rev.Stat.Mo.

(1994)[1] is the statutory authority for the appointment of the agents. The section provides in pertinent part as follows:

> "136.055 Agent to collect motor vehicle taxes and issue licenses – fees
>
> "1. Any person who is selected or appointed by the state director of revenue to act as an agent of the department of revenue, *whose duties shall be the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes* under the provisions of Section 144.440 RSMo. . . . "
> (emphasis and *italics* added)

The *statutory* duties of a fee agent are therefore limited to the sale of licenses and collection of taxes, as an agent of the department of revenue.

4. Respondents cannot validly expand the fee agents' duties beyond those duties which are set forth in the statute which created the office.

The Missouri Court of Appeals conceded that political affiliation would not be an appropriate requirement for the effective performance of the duties of a fee agent, if the duties were limited to those set forth in Section 136.055. *See*, App. 7.

The Court erred, however, by holding that the fee agents' duties were not limited to those set forth in the statute. The Court's holding allows respondents to

---

[1] All Missouri statutory references are to Revised Statutes of Missouri (1994).

expand the duties of a fee agent beyond those enumerated in Section 136.055, by accepting respondents' argument that fee agents have traditionally been regarded as agents or *"goodwill ambassadors" of the Governor. See, e.g., Sweeney vs. Bond*, 519 F.Supp. 124 (E.D.Mo. 1981); *aff'd*, 669 F.2d 542 (8th Cir., 1982); *cert. den.*, 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982). The Missouri Court of Appeals' justification for looking beyond the duties enumerated in Section 136.055 – "there are no statutes which prohibit fee agents from performing other duties" – stands the well-established principle that statutory bodies are vested with only such powers as are specifically conferred by statute on its head.

Respondents' attempt to revise and un-legislatively expand the duties of a fee agent must fail. The office of fee agent is a creature of statute. As such, the fee agent's authority is limited to those tasks set forth in the statute, and enlarged upon from time to time by the General Assembly.[2] *See, e.g., State ex rel. Mitchell vs. City of Sikeston*, 555 S.W.2d 281, 288 (Mo. *en banc*, 1977); *Trenton Trust Company vs. Western Surety Company*, 599 S.W.2d 481, 489 (Mo. 1980) ("A guardian is a creature of statute, and has only those powers that are prescribed by statute."); *Union Electric Company vs. Public Service Commission*, 591 S.W.2d 134, 137 (Mo.App. 1979) ("It is true, of course, that the Public Service Commission is an administrative body created by statute and has only such powers

---

[2] By way of example, fee agent offices have been authorized to provide voter registration application forms pursuant to Section 115.162.1, in compliance with the requirements of the federal National Voter Registration Act.

as are expressly conferred by statute and reasonably incidental thereto."); *State ex rel. Filkey vs. Scott,* 407 S.W.2d 79, 83 (Mo.App. 1965) (referring to the State Highway Commission and the Land Clearance for Redevelopment Authority, "Both are . . . created by legislative enactment . . . and vested with only such powers as are specifically conferred by our constitution and legislative enactments . . . "). *See,* also, cases from other jurisdictions collected at 81A CJS *States* §§ 120 and 142.[3]

"Goodwill Ambassador of the Governor" is not listed among the agents' duties set forth in Section 136.055. The Missouri Court of Appeals' observation that the type of service rendered to the public in a fee office is a reflection on the incumbent administration is equally true for *any* state employee, yet no one contends that *any* state

---

[3] A sampling of cases from other jurisdictions which state the general rule involving public entities or agencies other than municipalities include *Murray vs. State Board of Regents,* 401 P.2d 898, 901 (Kan. 1965) ("Governmental agencies are creatures of the legislature and can exercise only such powers as are expressly conferred by law and those reasonably necessary to make effective those powers expressly conferred"); *State of Maine vs. The Fin & Feather Club,* 316 A.2d 351, 355 (Maine 1974) ("public bodies may exercise only that power conferred upon them by law"); *State Department of Citrus vs. Office of the Comptroller,* 416 So.2d 820 (Fla.App. 1982) ("Administrative agencies and state officers possess only such authority or power as may be conferred upon them by law"); *State Department of Citrus vs. Huff,* 290 So.2d 130, 131-132 (Fla.App. 1974); *Board of Commissioners of Port of New Orleans vs. M/V Gotama Jayanti,* 274 F.Supp. 265 (D.C.La., 1967) ("powers of a public corporation or agency are limited by the statutory provisions under which it was created"); *New York State Thruway Authority vs. Hurd,* 250 N.E.2d 335, 339 (Ct.Apps.N.Y. 1969).

employee can be terminated on partisan political grounds. The mere *potential* for political embarrassment, moreover, is not of such vital importance that it overrides petitioners' First Amendment rights.

The Missouri Court of Appeals' opinion is at odds with (1) the well-established principle that entities created by statute have only those powers set forth in the statute; and (2) is in conflict with the decisions of this Court in *Elrod, Branti, Rutan,* and *O'Hare*. Petitioners submit that *Elrod, Branti, Rutan,* and *O'Hare* have effectively removed the fee agents from an ever-shrinking patronage pool, and that the termination of petitioners' contracts as fee agents should be set aside.

Essentially, respondents' basic argument, which was adopted by the Missouri Court of Appeals, is that fee agent positions have "always been regarded" as political appointments, and the fee agents accepted their appointments with the expectation that they would be dismissed upon election of a new Governor. This argument is flawed, for the following reasons.

First, the fact that something has "always been done" a certain way, or that a particular position has traditionally been regarded as a political position, is no defense to unconstitutional action. The same argument could have been made, for example, in defense of the political patronage system in *Rutan,* or in defense of a "separate but equal" school system in Topeka.

Second, petitioners' understanding or expectation that they would be removed from office upon the election of a Democratic Governor likewise does not excuse an unconstitutional termination of their contracts. The

patronage employees in *Rutan* also likely expected to be dismissed upon election of a sufficient number of the opposing political party; and it certainly couldn't be argued that segregated schools should remain intact because when the students enrolled in kindergarten, they expected to attend segregated schools through graduation. The fact that someone expects to be treated unconstitutionally doesn't legalize the unconstitutional treatment.

CONCLUSION

For the foregoing reasons, the trial court's judgment and order of March 3, 1997, and the Missouri Court of Appeals opinion of June 23, 1998, readopted and filed on January 25, 1999, should both be set aside and reversed.

Respectfully submitted,

LEO V. GARVIN, JR.
GARVIN & MALONEY
7700 Bonhomme Avenue
Suite 450
St. Louis, Missouri 63105
(314) 725-1135

Counsel of Record

PAUL M. MALONEY
GARVIN & MALONEY
7700 Bonhomme Avenue
Suite 450
St. Louis, Missouri 63105
(314) 725-1135

and

ELKIN L. KISTNER
SCHLUETER, HAYWOOD, BICK & KISTNER, P.C.
7700 Bonhomme Avenue
Suite 450
St. Louis, Missouri 63105
(314) 727-0777

Counsel for Petitioners

INDEX TO APPENDIX

Opinion of the Missouri Court of Appeals dated June 23, 1998 ..... App. 1

Order of the Missouri Court of Appeals readopting and entering opinion on January 25, 1999 ..... App. 13

Judgment of the Circuit Court of Cole County, Missouri ..... App. 15

Notice of Appeal ..... App. 35

May 27, 1997, Order transferring case to Missouri Court of Appeals ..... App. 39

July 28, 1998, Order overruling petitioners' Motion for Rehearing ..... App. 40

September 22, 1998, accepting petitioners' Application for Transfer to the Missouri Supreme Court ..... App. 41

January 19, 1999, Order retransferring case back to Missouri Court of Appeals ..... App. 43

First Amendment to the United States Constitution ..... App. 44

Fourteenth Amendment to the United States Constitution ..... App. 44

Section 136.055 Revised Statutes of Missouri (1994) ..... App. 45

Petition in the Circuit Court of Cole County, Missouri ..... App. 46

Amendment by Interlineation to Petition adding Mel Carnahan as party defendant ..... App. 58

Amendment by Interlineation to Petition adding Janette M. Lohman as party defendant ..... App. 59

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DAVID B. COURTWAY, et al., Appellants,	)	WD 54402
v.	)	OPINION FILED: June 23, 1998
MEL CARNAHAN, et al., Respondents.	)	

Appeal From the Circuit Court of Cole County, Missouri
Honorable Thomas J. Brown, III, Judge

Before: Hanna, P.J., Stith and Smith, JJ.

The appellants, fifty-eight named former Missouri Department of Revenue fee office agents who were appointed pursuant to § 136.050[1], appeal the circuit court's judgment denying their petition for declaratory judgment and injunctive relief on their claim of unlawful termination of their fee agent contracts. In their sole point on appeal, the appellants claim that the circuit court erred in denying their petition because the termination of their fee agent contracts violated their rights under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Constitution of the State of Missouri, which guarantee freedom of speech and association, in that there was not substantial evidence to support a finding by the circuit court that "political affiliation [was] an appropriate requirement for

---

[1] All statutory references are to RSMo 1994, unless otherwise indicated.

the effective performance of the duties of Department of Revenue fee office agents."

We affirm.

Facts

Shortly after The Honorable Mel Carnahan, a Democrat, was elected Governor of Missouri in late 1992, but before he took office, the appellants, all Republicans, filed a four-count petition in the Circuit Court of Cole County, Missouri, wherein they sought, *inter alia*, a declaration that the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Constitution of the State of Missouri protected them from the termination of, or interference with, their fee office agent contracts with the Missouri Department of Revenue (DOR) on the basis of their political affiliation. The petition also sought a preliminary and permanent injunction enjoining the named defendants, the Honorable John Ashcroft, the then Governor of Missouri; Raymond Wagner, the then Director of Revenue; and their successors in office from terminating or interfering with their positions as fee agents on the basis of their political affiliation. After Governor Carnahan was sworn-in as governor, he was substituted as a named defendant for Mr. Ashcroft. Likewise, in 1993, after Janette M. Lohman was appointed the director of Revenue (the Director) by Governor Carnahan, she was substituted as a named defendant for Mr. Wagner.

The appellants' request for a preliminary injunction was denied. Shortly thereafter, appellants were

terminated. They were replaced by new agents appointed by the Director at the direction of Governor Carnahan.

The case at bar proceeded to trial on January 14 and February 10, 1997, before the Honorable Thomas J. Brown, III. At trial, the appellants offered into evidence excerpts from the deposition of DOR officer Richard Lamb, answers to interrogatories prepared by the Director, and the testimony of two of the appellants. The respondents offered into evidence additional excerpts from the deposition of Mr. Lamb and excerpts from the deposition of Roy Temple, the former Chief of Staff for Governor Carnahan.

The evidence was that fee agents, appointed pursuant to § 136.055, are not required to personally operate their offices, but may hire their own employees and delegate office operations to them. They select their own office locations and pay their own operating expenses without any reimbursement from the State. They are not compensated by tax dollars, but by collecting statutorily authorized fees. They are not subject to the civil service code, and thus, are not required to cease their political activities once they are appointed. Historically, they have been viewed, by some, as ambassadors and agents of the Governor.

On March 3, 1997, the trial court entered in its findings of fact and conclusions of law granting judgment to the respondents declaring that the appellants could be terminated on the basis of their political affiliation without violating their constitutional rights, finding that "political affiliation [was] an appropriate requirement for the effective performance of the duties of Department of

Revenue fee office agents." The appellants appealed the judgment to the Supreme Court of Missouri on the basis that the case involved constitutional issues. On May 27, 1997, the Supreme Court of Missouri transferred the case to this court pursuant to Article V, Section 11 of the Constitution of the State of Missouri, because the issue presented on appeal involved neither the validity of a statutory or constitutional provision or the title to any state office.

Standard of Review

In a declaratory judgment action wherein an injunction is also sought, the judgment entered by the trial court will be affirmed unless: (1) there is no substantial evidence to support it; (2) it is against the weight of the evidence; or, (3) it erroneously declares or applies the law. *Hills v. Greenfield Village Homes Ass'n, Inc.*, 956 S.W.2d 344, 348 (Mo.App.1997).

I.

In their sole point, the appellants claim that the circuit court erred in denying their petition because the termination of their fee agent contracts violated their rights under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Constitution of the State of Missouri, which guarantee freedom of speech and association, in that there was not substantial evidence to support a finding by the circuit court that "political affiliation [was] an appropriate requirement for the effective performance of the

duties of Department of Revenue fee office agents." We disagree.

The United States Supreme Court has classified governmental terminations of public employees into two general factual scenarios: (1) if the employee is terminated solely on account of his political affiliation, it is classified as a "patronage dismissal" case; and, (2) if the employee's termination is based at least in part on an element of speech, it is classified as a *"Pickering"*[2] case. These classifications are significant in that they provide the appropriate legal tests to be used in determining whether the terminations in question here violated the asserted constitutional rights of the appellants. The parties agree, as do we, that the case at bar is a "patronage dismissal" case. As such, we will review the appellants' terminations as "patronage dismissals" to determine if the record supports the decision of the trial court in upholding them as lawful.

Generally, patronage dismissals of public employees are held to be violative of the rights granted to them by the First and Fourteenth Amendments of the United States Constitution. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 63 L.Ed.2d 574 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Sweeney v. Bond*, 519 F.Supp. 124 (1981). However, in this respect, these constitutional rights are not absolute, and may be curtailed for interests of vital importance, the burden of proving the

---

[2] *Pickering v. Board of Ed. of Township High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 629 (1967).

existence of which rests upon the government. *Elrod*, 427 U.S. at 348.

> [If a patronage dismissal] is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Id. at 363. The constitutional protection afforded to public employees by *Elrod* and *Branti* was extended to independent contractors, such as the appellants, in *O'Hare Truck Service, Inc. v. City of Northlake*, ___ U.S. ___, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996).

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 63 L.Ed.2d 574 (1976), provided the first test for determining whether a patronage dismissal furthered a vital governmental interest by a means least restrictive of freedom of belief and association. In *Elrod*, the United States Supreme Court held that only employees excepted from the constitutional protection from termination from their positions for partisan political reasons were those employees sharing a confidential relationship with their superiors and those in "policy-making" positions. *Id.* at 367. However, in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the court redefined the patronage dismissal test provided for in *Elrod*, holding that the proper inquiry is "whether the hiring authority can demonstrate that party affiliation is an *appropriate requirement* for the effective performance of the public office involved." *Branti*, 445 U.S. at 518 (emphasis added). Here, the record clearly reflects that the trial court applied the *Branti* test in determining that the appellants'

terminations did not violate their constitutional rights. Thus, the issue we must decide is whether the record supports a finding by the trial court that political affiliation was an appropriate requirement for the effective performance of the position of a fee agent.

The appellants' claim, that political affiliation was not an appropriate requirement for the effective performance of their positions, is based upon their contention that political affiliation has no relevance to the statutory duties for fee agents, as set forth in § 136.055, which states, in pertinent part, as follows:

> 1. Any person who is selected or appointed by that state director of revenue to act as an agent of the department of revenue, *whose duties shall be the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes under the provisions of section 144.440, RSMo,* and who receives no salary from the department of revenue, shall be authorized to collect form the party requiring such services additional fees as compensation in full and for all services rendered on the following bases. . . .

(Emphasis added.) We would agree that if the duties of a fee agent were strictly limited to those stated in § 136.055, political affiliation would not be an appropriate requirement for the effective performance of the position. However, we disagree with the appellants that we are limited to the statutory duties in § 136.055 to determine whether political affiliation was an appropriate requirement for the effective performance of the position of a fee agent.

In support of their argument that the duties of a fee agent should be limited to those set forth in § 136.055 in

determining whether political affiliation is an appropriate requirement for the effective performance of the position, the appellants cite *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo.banc 1977). The appellants' reliance on *Mitchell* is misplaced. It simply restated the well steeled rule that municipalities are limited to exercising those powers expressly or impliedly granted to them by statute. We find no authority for the proposition that in determining whether political affiliation was an appropriate requirement for the effective performance of the position of a fee agent, we are limited to an examination of the statutory duties set forth in § 136.055. In this respect, § 136.055 does not limit the duties of a fee agent to those expressly stated therein. In addition, there are no statutes which prohibit fee agents from performing other duties not expressly contained in § 136.055. In fact, the record reflects that the position of fee agent has historically encompassed many duties not expressly contained within § 136.055. These additional duties were recognized and discussed in *Sweeney v. Bond*, 519 F.Supp. 124 (1981).

In *Sweeney*, the U.S. District Court for the Eastern District of Missouri was called upon to determine whether a fee agent could be terminated on the basis of political affiliation, after fee agents appointed by former Governor Joseph Teasdale, a Democrat, were terminated in 1981, by former Governor Kit Bond, a Republican. *Sweeney* was decided before *O'Hare*. As a result, because the court found that the fee agents were independent contractors, rather than employees, the court found they were not entitled to constitutional protection from termination on the basis of political affiliation. Nevertheless, the court proceeded to examine the issue of whether the

fee agents' terminations violated their constitutional rights under the *Branti* test if they had been determined to be public employees. The court stated that even if fee agents were deemed to be public employees, requiring analysis under the *Branti* test, they would not be afforded constitutional protection from their terminations because it found that political affiliation was an appropriate requirement for the effective performance of the duties of fee agents.

In determining that political affiliation was an appropriate requirement for the effective performance of the position of fee agent, the *Sweeney* court noted that

> fee agents have more than five million contacts with the public during their term and do serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimizes the usual deficiencies of patronage.
>
> First of all, there is little or no additional cost to the government, for the fees of the agents are simply added to the costs of the licenses and taxes, thus allowing the state the full and complete measure of its taxing bounty.
>
> Second, any citizen wanting to avoid the agent's small fee can seek out a branch office or utilize the mails to pay the license fees and taxes without paying the $1.00 fee. He may have to forego the convenience of location or scheduled

availability, but that would be a luxury that he could judge the value of and accept or decline.

Third, the requirements for filling the position of fee agent are simple and generic, no special skill or professional knowledge is needed, and thus large numbers or [sic] individuals could easily qualify for the posts with little difficulty in completing the work required.

Fourth, while not requiring the confidentiality and policymaking function of the top-level positions in state government, there is the responsibility of demonstrating loyalty, efficiency, and partisan pride, which could be interpreted as a hallmark of the incumbent administration.

Fifth, the fee holder can delegate practically all of the chores and responsibility of the office to others that he employs, and thus continue to actively and fully participate in the political activities of his choice without the restriction of the civil service code or the loss of services to the state.

Sixth, the novel status of motor vehicle license fee agents supports the argument that the state interest in having such an unusual arrangement is an intentional and planned circumstance, designed to meet and overcome the shortcomings of most patronage assignments.

In summary, then, the fee agents are extraordinarily suited for partisan, political appointment, and may well be a near perfect example of the kind of role suggested in *Branti*.

Sweeney, 519 F.Supp. at 129-30.

The record here supports the fact that the position of a fee agent is substantially, if not completely, the same today as it was at the time *Sweeney* addressed the issue of whether political affiliation was an appropriate requirement for the effective performance of the position. As such, we find the reasoning of *Sweeney* to be as equally applicable today as it was when it was decided. We find no compelling reason to reach a different result here other than that contemplated by the *Sweeney* analysis. Particularly compelling for us in reaching this decision is the fact, as discussed in *Sweeney*, that, unlike instances where tax dollars are expended, in the case of fee agents, very little, if any, tax dollars are used to support them. This fact distinguishes the fee agents' termination on the basis of political affiliation from the termination of an employee under a political patronage or spoils system supported by public funds, which is generally viewed as repugnant by the general public.

Because we find the reasoning of *Sweeney*, on the issue presented, to be persuasive, we hold that the trial court did not err in declaring that he appellants' termination based on their political affiliation was an appropriate requirement for the effective performance of individuals in the position of a fee agent appointed pursuant to § 136.055.

Point denied.

Conclusion

The judgment of the circuit court declaring that the appellants' constitutional rights were not violated by their termination as fee agents based on their political affiliation is affirmed.

Edwin H. Smith, Judge

All concur.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DAVID B. COURTWAY, ET AL., APPELLANTS,	)	WD 54402
	)	CIR. CT. CV193-19CC
VS. (COLE)	)	
MEL CARNAHAN, ET AL., RESPONDENTS.	)	

ORDER

NOW it appearing to this Court that on January 19, 1999, the Missouri Supreme Court issued an order retransferring the above-styled cause to this Court, and being fully advised in the premises,

IT IS ORDERED that the majority opinion written by Honorable Edwin H. Smith, adopted and filed by this court on June 23, 1998 be, and it is hereby, readopted as the opinion of this Court and that the mandate of this Court be issued forthwith accordingly.

Dated this 25th day of January, 1999.

/s/ Patricia A. Breckenridge
PATRICIA A. BRECKENRIDGE
CHIEF JUDGE

cc: Circuit Clerk, Cole County
Leo V. Garvin, Jr.
Michael L. Boicourt
West Publishing Company
Missouri Lawyers Weekly
Roberta Shikles
Lexis-Nexis
LOIS
Shepards
Janine Estrada-Lopez, Librarian

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

DAVID B. COURTWAY, et al.,	)	
Plaintiffs,	)	No. CV193-19CC
v.	)	Division I
MEL CARNAHAN, et al.,	)	
Defendant	)	

FINDING OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This Court conducted a bench trial of this matter on January 14 and February 10, 1997, at which time the plaintiffs and the defendants submitted witnesses and exhibits to support their opposing positions. The case is under submission for final judgment. The plaintiffs have requested that the Court issue findings of fact and conclusions of law in support of its judgment.

FINDINGS OF FACT

Parties

1. The plaintiffs, now fifty-eight (58) in number after one individual originally named voluntarily withdrew and the plaintiffs filed suggestions of death in support of the dismissal of original plaintiff Dolores Cook, previously served as the Department of Revenue fee office agents acting under contract to provide certain statutorily mandated services to the public with respect

to motor vehicle registration and operator's licenses. The plaintiffs are all residents and citizens of the State of Missouri. The plaintiffs are all active members of the Republican party and entered into their contractorial relationships with the Department of Revenue during the terms of Republican Governors.

2. Mel Carnahan is the duly elected Governor for the State of Missouri. Governor Carnahan is a Democrat. He was elected on November 3, 1992, and assumed office in January, 1993. During the twelve years immediately preceding the assumption of the governor's office by defendant Carnahan, Christopher "Kit" Bond and John Ashcroft, both now serving as United States Senators for the State of Missouri, served consecutively in the capacity of Governor. Senators Bond and Ashcroft are both members of the Republican party. Each of the plaintiffs was appointed as a Department of Revenue fee agent during the terms of former Governors Bond and Ashcroft. Janette M. Lohman is the duly appointed Director for the Missouri Department of Revenue. She was appointed to that position by Governor Carnahan in 1993.

3. The two plaintiffs who testified during the trial of this matter, and many, if not most, of the plaintiffs, were appointed as fee agents in 1981 during the administration of ex-Governor Bond. Each was appointed only after the contracts of their predecessors as fee agents had been terminated by Governor Bond's appointed Director of Revenue. All of the former fee agents which the plaintiffs replaced were Democrats.

4. In 1993, after Mel Carnahan assumed the office of governor, the contracts of each of the plaintiffs were

terminated. In the case of the majority of those terminations, the individuals appointed as successors to the plaintiffs in the localities where the plaintiffs had served as fee agents were Democrats.

5. Not all fee agencies are held by individuals. At the present time, approximately 27 fee agencies are held by municipalities or civic organizations. This represents an increase compared to the situation which existed at the time defendant Carnahan assumed the Governorship, but there have traditionally been some organizations serving as fee agents. With the exception of these municipalities and civic organizations, the traditional practice has been that almost all individual fee agents are active members in the same political party as the incumbent governor. As a matter of tradition and practice, each time the governor's mansion changes hands from one political party to another most individual fee agents are terminated in favor of replacements who have been and continue to be active in the affairs of the victorious party.

The Nature and Duties of Fee Agents

6. Fee agents are appointed pursuant to § 136.055 RSMo 1994, and are authorized to conduct the business specifically set forth in that statutory section. As provided for in § 136.055, fee agents receive no compensation whatsoever from the State of Missouri. Rather, when they conduct an authorized transaction, for example a renewal of a driver's license, the registration of a motor vehicle, or the collection of sales tax on a newly purchased automobile, they are authorized to charge each customer a statutory fee for each transaction. The income of fee

agents is derived entirely from the imposition of those fees upon the customers who do business with fee agents.

7. At the present time, there are 167 separate fee agents appointed by the Director of Revenue to do business pursuant to § 136.055. Approximately 27 of those fee agents have been awarded to municipalities or civic organizations. The remaining agents are individuals.

8. In fiscal 1996, these fee agents transacted over 7,747,000 individual transactions with the public. These transactions represent personal contacts between fee agents, and/or the employees of the fee agents, and individual Missouri citizens. All of the State of Missouri's public employees, taken as a whole, have many times fewer opportunities to transact business individually and personally with Missouri citizens each year than do these appointed fee agents who have a contractual relationship with the Department of Revenue.

9. Individuals appointed as fee agents may hire such employees as they believe are necessary to transact the business of their agencies. The Department of Revenue has no control whatsoever over what employees each fee agent hires. Individual fee agents are not required to personally operate their offices. They can choose to delegate office operations to the employees which they choose. That is true with respect to the fee agents presently serving under a contractual relationship with the Department of Revenue and was also true with respect to the plaintiffs while they served as fee agents.

10. Fee agents are not subject to the same degree of supervision as are public employees of the State of Missouri. Although the Department of Revenue certainly

monitors the activities of fee agents to assure that services are being rendered to the public and that the State receives the full bounty of its licensing and taxing authority, fee agents act in many ways as independent businessmen, hiring their own employees and having a choice as to whether to be personally involved in the operation of the business of their agencies.

11. Fee agents pay all of their own operating expenses. The rent on premises used for fee agent business, the cost of supplies and utilities, and the cost of labor are all borne by the fee agents themselves. The operation of these offices does not cost the State of Missouri anything. Except for the expertise which they may bring to the operation of their individual and independent businesses, the duties of fee agents are generic and ministerial. There are no standard qualifications for fee agents. It is not necessary that a prospective appointee have any special education, experience or training. This is in stark contrast to public employees of the State of Missouri, especially those who have personal contact with individual citizens, who generally are required to possess certain qualifications, including education, experience and training prior to their employment.

12. Fee agents offer a service of convenience. However, any citizen of this State may choose not to use the services of his or her local fee agent, and thereby avoid the additional fee charged by that fee agent, and travel to a branch motor vehicle office operated directly by the Department of Revenue or he or she may choose to transact motor vehicle-related business through the mails.

13. Given the convenience of the fee agent as opposed to unnecessary travel and mail transactions, each fee agent operates a virtual monopoly in his or her area of operation.

The Political Nature of Fee Agents

14. Not only do individual fee agents typically belong to the same political party as the incumbent governor, but they are themselves political animals. Traditionally, almost all individuals appointed as fee agents have been active in partisan political affairs prior to their appointment. Typically, the fee agents appointed by Governor Carnahan have been individuals well known to him and his personal staff or they have come highly recommended by the Governor's political allies. Most fee agents have been and are actively engaged in political affairs both before and during their appointments are [sic] fee agents. The plaintiffs who testified, Steven Holst and Vernon Schmidt, were actively involved in Republican party affairs both before and during their tenure as fee agents. They remain actively involved in partisan politics after their termination. Both held a number of local political posts including Republican committeeman [sic]. Both campaigned for and contributed to Republican political candidates. Their experiences are typical of all plaintiffs. The appointment of individuals as fee agents in no way restricts their partisan political activities.

15. The unrestricted political activities of fee agents contrasts sharply to the situation which prevails for most public employees of the State of Missouri. As plaintiffs Holst and Schmidt admitted during their testimony, most

State employees would not have been free to engage in the same quantity and nature of political activities as they did while fee agents. During trial, the Court took judicial notice of § 36.150.5, RSMo 1984 which restricts the political activities of state employees.

16. Historically, there has always been almost complete turnover of fee agents every time the Governor's mansion changed hands from one political party to the other. Most of the plaintiffs were appointed after ex-Governor Bond, a Republican, succeeded ex-Governor Teasdale, a Democrat. Based upon historical tradition, none of the former fee agents who are plaintiffs could possibly have formed a reasonable expectation that their contracts as fee agents would continue unabated in the event that, as actually occurred in November, 1992, a Democrat was elected to the Office of Missouri Governor.

17. Because of the unique nature of fee agents, no plaintiff, unlike public employees or independent contractors subjected to patronage practices, had their First Amendment rights to political speech and association abridged by the traditional practice at issue in this case. Neither Governor Carnahan nor the Democratic Party solicited contributions or support from the plaintiff fee agents. The plaintiffs, known to be political animals as were their predecessors and successors, were never subject to coercion to change their political affiliations. In fact, none of the plaintiffs supported Mel Carnahan in the 1993 gubernatorial election. The plaintiffs are political operatives whose activities in support of the Republican Party and Republican Party candidates were never abridged in any way whatsoever before or after their terminations as fee agents.

18. As testified by governor Carnahan's former Chief of Staff, Roy Temple, political affiliation no longer plays a role in most gubernatorial appointments. Almost all state jobs, except at the very highest levels, are entirely patronage free. Governor Carnahan did not even limit appointments to his cabinet to members of the Democratic Party. Based upon historical tradition with respect to the practice of replacing fee agents and prior cases involving the same issues as are presented in this matter, Governor Carnahan and his staff believed that fee agents could and should be treated differently. In making his decisions to terminate the contracts of plaintiffs and other incumbent fee agents, and to appoint, in large part, Democrats to replace them in those offices held by individuals, the Governor and his staff took into account a memorandum which explained the cases, and the rationale in support of the conclusions made in those cases, resolved in favor of ex-Governor Bond after he assumed office in 1980. The Governor's Office relied on the results in those cases to determine that individual fee agents could be determined and replaced by individuals of the Governor's personal choosing.

When testifying about why the political affiliation of fee agents should have been considered by the Governor in making appointments, whereas the political affiliation of most State employees was not, Mr. Temple made these salient points: whereas fee agents have historically always been individuals active in local partisan politics, most state employees are prohibited from engaging in most partisan political activities; the public expects fee agents to be political because they have always been members of the same political party as the governor and

the public understands the representative nature of fee agents vis a vis the gubernatorial incumbent; whereas most public employment positions require specific training, experience and education, there are no generic qualifications for fee agents whose duties on behalf of the State are merely ministerial; and that the members of both political parties have always understood that the political affiliation of these fee agents, who have in excess of 7.7 million personal and individual contacts with the public each year and serve as ambassadors of the incumbent governor at the grass roots, is an appropriate and proper consideration in their selection.

19. The loyalty of fee agents to the incumbent governor who is responsible for their appointment is the only practical guarantee that the services which they perform for the public will be rendered in a courteous and efficient manner. All state employees and most independent contractors are subject to constant onsight supervision and control. Fee agents are, in many ways, anomalies, responsible for operating individual business with their own employees at their own chosen locations. Because fee agents operate virtual monopolies, unless an individual customer goes to the inconvenience of traveling to a Department of Revenue branch office or performing his motor vehicle transaction by mail, the only way to ensure that these individual fee agents will perform courteous and efficient services is based upon their loyalty to the governor and the fact that such fee agents traditionally have considered themselves to be the administration's ambassadors.

20. Any incumbent governor has limited opportunities to make personal contact with the citizens of this

state. On the other hand, almost every eligible voter in Missouri has a driver's license and/or owns a motor vehicle. A governor makes personal contact with his constituents through his representatives, the fee agents. If the citizenry is happy with the services performed by fee agents, that fact will reflect positively upon their perception of the incumbent administration.

21. Fee agents are known to be politically active in their communities. It would be anomalous, for example, for the ambassadors of a Democrat governor at the grass roots to constantly be campaigning on behalf of Republican Party candidates.

22. The political expectations which an incumbent governor and the public have for fee agents in no way interferes with the operations of fee agent offices. Unlike public employees, fee agents engage in political activities unfettered by statutory constraints.

23. During his testimony, Mr. Temple gave an example of why it is important for fee agents to be loyal to the governor who is responsible for their appointment. The Missouri Legislature has enacted a Motor Voter Law. This Law provides that fee agents will be active in registering more eligible Missourians to vote. This is an important issue to Governor Carnahan and the Democratic Party. John Ashcroft, Governor Carnahan's predecessor in office, opposed this law. It is not reasonable to expect that the plaintiffs, who owed their contractual status to the former governor, would be as diligent in registering new voters as have the Democratic fee agents appointed by Governor Carnahan. This is a matter of party loyalty and

political policy. The Democratic Party supported this initiative whereas the Republican Party opposed it. Given the traditional practice with respect to fee agents, it is not rational to expect that Governor Carnahan should be forced to rely upon his political enemies not only to enforce the motor voter initiative but to act as his ambassadors in conducting more than 7,747,000 personal transactions with the citizens of the State of Missouri each fiscal year.

24. Fee agents are an unique Missouri institution. They have always been the political representatives of the administration at the grass roots and the public has come to recognize that fact. Political affiliation, given the unique historical circumstances surrounding the Missouri practice in this regard, is an appropriate requirement in the effective performance of fee agent duties and has been so regarded by both Democrats and Republicans for many years.

Factual Findings in the *Sweeney v. Bond* cases

25. When Republican Kit Bond succeeded Democrat Joe Teasdale in January, 1981, most individual fee agents who were democrats were replaced by individual fee agents who were Republicans. Most of the plaintiffs were among those 1981 replacements. Litigation ensued. The United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit both found that, with respect to precisely the same issue as presented by this case, political affiliation was an appropriate requirement for the effective

performance of fee agency duties. Both courts cited specific facts in favor of their conclusions. The defendants in this case presented evidence that each of the factual considerations relied upon by these federal courts remains true today. The plaintiffs failed to demonstrate that a single indicia of fee agency leading to the conclusions in these prior cases has changed during the intervening years or is no longer valid. Because these factual findings made by the aforementioned federal courts are with respect to precisely the issue presented to this Court and because the record in this case demonstrates that those prior factual findings remain valid, those findings are pertinent to the disposition of this case.

26. In *Sweeney v. Bond*, 519 F.Supp. 124, 129-130, E.D.Mo. 1981, the Court found the following facts to be true:

> "[2] 6. While the Court expressly feels that plaintiffs are *not* employees, and therefore not shielded by *Elrod*, even had the Court determined them to be employed by the state, they still would not prevail, for *Branti* makes the comment that where "party affiliation is an appropriate requirement for the effective performance of the office," patronage dismissal may be allowed. *Branti* 445 U.S. at 518, 100 S.Ct. at 1295.
>
> The fee agents have more than five million contacts with the public during their term and do serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages

of patronage employees to their posts. The unique structure of the fee agent position minimized the usual deficiencies of patronage.

First of all, there is little or no additional cost to the government, for the fees of the agents are simply added to the costs of the licenses and taxes, thus allowing the state the full and complete measure of it taxing bounty.

Second, any citizen wanting to avoid the agent's small fee can seek out a branch office utilize the mails to pay the license fees and taxes without paying the $1.00 fee. He may have to forego the convenience of location or scheduled availability, but that would be a luxury that he could judge the value of and accept or decline.

Third, the requirements for filing the position of fee agent are simple and generic, no special skill or professional knowledge is needed, and thus large numbers of individuals could easily qualify for the posts with little difficulty in comp[l]eting the work required.

Fourth, while not requiring the confidentiality and policymaking function of the top-level positions in state government, there is the responsibility of demonstrating loyalty, efficiency, and partisan pride, which could be interpreted as a hallmark of the incumbent administration.

Fifth, the fee holder can delegate practically all of the chores and responsibility of the office to others that he employs, and thus continue to actively and fully participate in the political activities of his choice without the restriction of a civil service code or the loss of services to the state.

> Sixth, the novel status of motor vehicle license fee agents supports the argument that the state interest in having such an unusual arrangement is an intentional and planned circumstance, designed to meet and overcome the shortcomings of most patronage assignments.
>
> In summary, then, the fee agents are extraordinarily suited for partisan, political appointment, and may well be a near perfect example of the kind of role suggested in *Branti*."

27. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed. In *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir. 1982).

> In *Branti v. Finkel, supra*, 445 U.S. at 517, 100 S.Ct. at 1294, the Court stated that "*Elrod* recognize[d] that party affiliation may be an acceptable requirement for some types of government employment." The burden is on the hiring authority to "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518, 100 S.Ct. at 1294. We believe defendants in this case have carried their burden.
>
> The district court held that party affiliation was an appropriate requirement for the position of fee agent because fee agents serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure

of the fee agent position minimizes the usual deficiencies of patronage.

Sweeney v. Bond, supra, 519 F.Supp. at 129.

Fee agents are not required to work in their offices. They are free to delegate duties of the offices to workers hired by the fee agent. Thus fee agents can continue to actively participate in political activities free of the restrictions of a civil service code and without interruption of service to the fee agency. There is no cost to the government of the fee agents' service as the cost is borne by the customer. There are 158 fee agent offices in Missouri, the vast majority of which are now operated by Democrats; in 1980 there were over 4.5 million transactions between fee agents and citizens of Missouri. Fee agents are traditionally looked upon as representatives of the incumbent governor. Many spend much of their time in this way and are not restricted in their active pursuit of party politics by the confines of their fee agent offices. we hold that political affiliation is an appropriate requirement of the effective performance of fee agents and has been so regarded by both Democrats and Republicans for many years."

CONCLUSIONS OF LAW

1. Venue to entertain this case is properly vested in the Circuit Court of Cole County, Missouri. In addition, this Court has personal jurisdiction over the parties and subject matter jurisdiction over the matters placed in issue by the pleadings filed in this case.

2. The United States Supreme Court first determined that government employees were not universarily

[sic] subject to termination on the basis on political beliefs in 1976. *Elrod v. Burns*, 427 U.S. 347, 375, 96 S.Ct. 2673, 2690, 29 L.Ed.2d 547 (1976). In *Elrod*, the Supreme Court announced an exception to that general rule for policy making, confidential employees. That case involved the Sheriff's Office in Cook County, Illinois.

3. Four years later in *Branti v. Finkle*, 445 U.S. 507, 519, 100 S.Ct. 1287, 1295 (630 L.Ed.2d 574 (1980), the Supreme Court determined that an assistant public defender's position could not properly be conditioned upon his allegiance to a particular political party. However, the Court changed the test for those public employees who were subject to patronage decisions. "[T]he ultimate inquiry is not whether the label 'policy maker' or 'confidential' fits a particular position; [but] rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved." *Branti* at 518, 100 S.Ct. at 1295. Both *Elrod* and *Branti* were limited to the terminations of public employees.

4. In a Missouri gubernatorial election held the same year as *Branti* was decided, Republican Christopher "Kit" Bond succeeded Democrat Joseph Teasdale. The victorious candidate proceeded to terminate the contracts of most of the fee agents whom he inherited, all were Democrats, and to replace them with new fee agents who were Republicans. Litigation ensued. The Missouri Court of Appeals for the Western District determined that fee agents could be terminated for partisan, political reasons because they were independent contractors not protected from political terminations by *Elrod* and *Branti*. *Stein v.*

James, 651 S.W.2d 624 (W.D. Mo. App. 1983). That issue is no longer a pivotal consideration. *See*, e.g. conclusion of law number 6 *supra*. Earlier, the United States Court of Appeals for the Eighth Circuit and the United District Court for the Eastern District of Missouri had reached the same result on the independent contractor issue, but, in addition, had independently determined that fee agents could be terminated in any event because political affiliation was an appropriate requirement for the effective performance of fee agency duties. *Sweeney v. Bond*, 519 F.Supp. 124, 129-130 (E.D. 1981), *aff'd* 669 F.2d 542, 546 (8th Cir. 1982). As discussed *supra*, the factors relied upon by the three United States District Court judges and the three United States Appellate Court judges in reaching the latter conclusion have not charged [sic] since 1982, as demonstrated by the evidence submitted by defendants in this case, which evidence the plaintiffs failed to effectively dispute. In effect, the District Court and Eighth Circuit opinions in *Sweeney* remain sound precedent and persuasive authority for disposing of this identical issue in this case.

5. In 1990, the United States Supreme Court extended its line of patronage decisions to include a broader range of personnel actions than simply terminations as involved in *Elrod* and *Branti*. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). Although *Rutan* also involved only public employees and not independent contractors, it extended First Amendment protections to such personnel decisions as hirings, promotions and transfers. However, the test set forth in *Branti* remained undisturbed. The issue in

Rutan was whether to extend this line of cases "to promotion, transfer, recall or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement." *Id.* at 68, 110 S.Ct. Reporter at 2734. With respect to political affiliation as an appropriate requirement for particular jobs, that issue was not relevant to the individual plaintiffs in *Rutan*. Contrary to the position of plaintiffs, the *Branti* test for determining exceptions to the general anti-patronage rule remain undisturbed by *Rutan*. The language cited by plaintiffs, to the effect that government can protect itself form disruption by dismissing only high-level employees is dicta and appears that a point when the *Rutan* court was discussion [sic] the holding in *Elrod*. *Id.* at 76, 110 S.Ct. at 2737. As discussed *supra*, the *Elrod* test was modified and superseded by the test announced in *Branti*.

6. In June, 1996, the United States Supreme Court extended, for the first time, the reasoning of *Elrod* and *Branti* to independent contractors. *O'Hare Truck Service, Inc. v. City of Northlake*, 64 U.S. Lw. 4694. In the first sentence of its opinion in *O'Hare*, the Court reaffirmed the *Branti* test, whether political affiliation is a reasonably appropriate requirement for the job in question. After *O'Hare*, the defendants are not entitled to prevail simply because plaintiff fee agents acted in the capacity of independent contractors as opposed to public employees. Nevertheless, when defendants demonstrate, as they have done in this case, that political affiliation is an appropriate requirement for the effective performance of fee agency duties, the decision in *O'Hare* does not change the fact that defendants are entitled to judgment in their favor. Although political affiliation as an appropriate

requirement for tow-truck operations was not addressed by the Court in *O'Hare*, the decision in that case gives some guidance to this Court in applying the *Branti* test. The Supreme Court extended patronage protections to an independent contractor who had a reasonable expectation of a continued contractorial relationship and who had been subjected to coercion to provide financial support to the mayor of Northlake. As abundantly demonstrated by defendants in this case, the plaintiff fee agents did not have a reasonable expectation that their contractorial relationship with the Department of Revenue would continue in the event that the Democratic Party, as in fact occurred, won the 1992 gubernatorial election. Furthermore, fee agents are themselves politicians who were granted contracts on the basis of their political activities and who were never expected to give financial or other support to the opposing party.

7. The decisions of the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit in the *Sweeney* opinions are precisely on point with respect to the application of the *Branti* test to plaintiff fee agents. No intervening case has adversely effected [sic] the current applicability of the conclusions of those courts that political affiliation is an appropriate requirement for the effective performance of the duties of fee agents. In fact, the defendants produced evidence proving that each element relief upon by those courts in reaching their conclusions is true today. The plaintiffs failed to demonstrate that a single fact relied upon by those courts in reaching their conclusions dispositive of the issue in this case has changed over the intervening years. "[P]olitical affiliation

is an appropriate requirement for the effective performance of fee agents and has been so regarded by both Democrats and Republicans for many years." *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir. 1982).

JUDGMENT

Based upon the Court's detailed Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that judgment be entered on behalf of defendants on the basis that political affiliation is an appropriate requirement for the effective performance of the duties of Department of Revenue fee office agents.

Costs are taxed against the plaintiffs.

/s/ Thomas J. Brown, III
Honorable Judge
Thomas Brown, III

NOTICE OF APPEAL TO SUPREME COURT OF MISSOURI

Missouri Form 6-85

CASE NUMBER CV193-19CC

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI DIVISION

DAVID B. COURTWAY, et al.,

See attached sheet with supplemental listing of plaintiffs/appellants

Plaintiff(s)

VS.

MEL CARNAHAN, in his capacity as Governor of the State of Missouri, and JANETTE B. LOHMAN, in her capacity as Director of Revenue,

Defendant(s)

APPELLATE NUMBER

[ ] Filing as an Indigent
[X] Docket Fee Enclosed

JUDGE/DIVISION THOMAS J. BROWN

COURT REPORTER PAMELA HARKER
[ ] SOUND RECORDING EQUIPMENT

REPORTER'S TELEPHONE (573) 634-9194

DATE OF VERDICT/FINDING N/A

DATE OF JUDGMENT/SENTENCE
MARCH 3, 1997

DATE POST TRIAL MOTION FILED N/A

DATE RULED UPON N/A

Jurisdiction of the Supreme Court is based on fact that this appeal involves:

(Check appropriate box)

* [ ] The validity of a treaty or statute of the United States.

* [ ] The validity of a statute or provision of the Constitution of Missouri.

* [X] The construction of the revenue laws of Missouri.

[X] The title to any state office in Missouri.

[ ] The punishment imposed is death.

* If the basis of jurisdiction is validity of a United States treaty or statute, the validity of a Missouri statute or Constitutional provision or construction of Missouri revenue laws, a concise explanation, together with suggestions, if desired, is required. This may be filed as part of or with this notice of appeal or, in the alternative, may be filed within ten days after the notice of appeal is filed, by filing it directly with the Clerk of the Supreme Court. Rule 81.08 (b) and (c) and Rule 30.01 (f) and (g).

DATE NOTICE FILED 4-8-97

LENGTH OF EXTENSION IF GRANTED

DATE OF APPEAL BOND N/A

AMOUNT OF BOND $ N/A

NAME OF SURETY (IF APPLICABLE) N/A

TELEPHONE N/A

ADDRESS OF SURETY N/A

CHARGES (CRIMINAL CASES) N/A

LENGTH OF SENTENCE N/A

(ATTACH ADDITIONAL SHEETS IF NECESSARY)

APPELLANT'S NAME DAVID B. COURTWAY

ADDRESS 108 N. MAIN
DESOTO, MISSOURI

TELEPHONE (314) 585-8141

APPELLANT'S NAME See attached sheet

ADDRESS

TELEPHONE

RESPONDENT'S NAME MEL CARNAHAN

ADDRESS STATE CAPITOL
JEFFERSON CITY, MISSOURI

TELEPHONE (573) 761-3222

RESPONDENT'S NAME JANETTE B. LOHMAN

ADDRESS TRUMAN STATE OFFICE BUILDING
JEFFERSON CITY, MISSOURI

TELEPHONE (573) 751-5600

BRIEF DESCRIPTION OF CASE
See attached sheet

(Attach Copy of Judgment and Appeal Bond)

SIGNATURE OF ATTORNEY OR APPELLANT
/s/ Leo Garvin

DATE April 8, 1997

MEMORANDUM OF THE CLERK

I have this day mailed by registered-certified (strike one) mail a copy of the within notice of appeal to each of the following persons at the address stated below:

Leo V. Garvin, Jr.
Attorney for Petitioner/Appeallant [sic]
The Boatmen's Bank Bldg.
7800 Forsyth Blvd., 6th Floor
St. Louis, MO 63105

Michael Boicourt
Assistant Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102

I have also mailed a copy of the notice of appeal to the clerk of the Supreme Court together with the docket fee deposited by appellant or a copy of an order granting leave to appeal as indigent.

/s/ Linda L. Roark
CLERK

4/14/97
DATE

By: /s/ Illegible
DEPUTY CLERK

(Seal)

Supreme Court of Missouri

en banc

May 27, 1997

David B. Courtway, et al., Appellants,	)	
vs.	)	Supreme Court
Mel Carnahan, et al., Respondents.	)	No. 79882

ORDER

Cause ordered transferred to the Missouri Court of Appeals. Western District, in which jurisdiction is vested. Mo. Const. art. V, sect. 11.

Day-to-Day

/s/ John C. Holstein
John C. Holstein, Chief Justice

(Seal)

Missouri Court of Appeals
WESTERN DISTRICT
1300 OAK STREET

KANSAS CITY, MO. 64106-2970

TERENCE G. LORD AREA CODE 816-889-3600
CLERK-DOCKET ATTORNEY FAX 816-889-3668

July 28, 1998

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD
RE: COURTWAY, DAVID B., ET AL., APPELLANT
vs.
CARNAHAN, MEL, ET AL., RESPONDENT
WD# 54402

Please be advised that Appellant's motion for rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03.

TERENCE G LORD
CLERK DOCKET ATTORNEY

cc: Leo V Garvin
Michael L Boicourt

In the Supreme Court of Missouri
En Banc
No. 81053

September Session, 1998

David B. Courtway, et al.,

Appellants,

vs.

Mel Carnahan, et al.,

Respondents.

THE STATE OF MISSOURI

to the Judges of the Missouri Court of Appeals, Western District,

GREETINGS:

Now at this day, on consideration of the application of appellants to transfer the above-entitled cause, No. 54402, from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby sustained.

Therefore, you, as Judges of the Missouri Court of Appeals, Western District, are ordered to send to this Court on or before the 22nd day of October, 1998, a full and complete transcript of the record and proceedings in your court, together with copies of all records and briefs filed in your court in the said cause.

It is further ordered that you recall your mandate, if the same has issued, and that you take no further action in this case.

Benton, C.J., White and Wolff, JJ., not participating.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Seal of said Court, at my office in the City of Jefferson, this 22nd day of September, 1998.

/s/ Thomas F. Simon
Clerk, Supreme Court of Missouri

/s/ Christine S. Vinson
Deputy Clerk

(Seal)

Supreme Court of Missouri

en banc

January 19, 1999

DAVID B. COURTWAY, et al., Appellants,	)	
vs.	)	Supreme Court
MEL CARNAHAN, et al., Respondents.	)	No. 81053

ORDER

Cause ordered retransferred to the Missouri Court of Appeals, Western District.

Day-to-Day

/s/ William Ray Price, Jr.
William Ray Price, Jr.
Acting Chief Justice

Benton, C.J., White and Wolff, JJ., not participating.

CONSTITUTION OF THE UNITED STATES

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

136-055. Agent to collect motor vehicle taxes and issue licenses – fees

1. Any person who is selected or appointed by the state director of revenue to act as an agent of the department of revenue, whose duties shall be the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes under the provisions of section 144.440, RSMo, and who receives no salary from the department of revenue, shall be authorized to collect from the party requiring such services additional fees as compensation in full and for all services rendered on the following basis:

(1) For each motor vehicle or trailer license sold, renewed or transferred – one dollar and fifty cents;

(2) For each application or transfer of title – one dollar and fifty cents;

(3) For each chauffeur's, operator's or driver's license – two dollars;

(4) No notary fee or other fee or additional charge shall be paid or collected except for electronic telephone transmission reception –[1] two dollars.

2. This section shall not apply to agents appointed by the state director of revenue in any city, other than a city not within a county, where the department of revenue maintains an office. All fees charged shall not exceed those in this section.

(Amended by L. 1990, S.B. No. 560, § A.)

---

[1] Revisor's note – 1990: Word "at" appears in original roll.

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

DAVID B. COURTWAY, WARREN C. CURT, HELEN COLLINS, BARBARA HARRISON, CHERYL REAVIS, DOLORES COOK, MARVIN FORMAN, CONNIE SHERRILL, CAROL MURPHY, MARGUERITE LYON, BOBBIE RICHARDSON, BRENDA M. SWAIN, RODNEY CLAYTON, PAT CATANZARO, SHERRI DURK, SUE COCHRAN, GERARD SCHMIDT, JUDITH DOSS, WILLIAM L. WRIGHT, ~~CHRIS STUEVVEN~~ DOROTHY STUEBBEN, NEIL FISCHER, NEIL UMFLEET, DOROTHY KINCAID, VERNON F. SCHMIDT, STEPHEN D. HOLST, ROBERT MOONEY, JOAN TOMPKINS, DONALD CRANE, LINDA CRANE, THOMAS HAMMACK, JAN HAMMACK, KIRBY CRISP, NORAH E. RINGO, LETHA BECK, RUBY MANSON, WILLIAM NICHOLS, BILL HAAG, JR., JOHN KLEBBA, EDGIL PREWITT, JOHN SAYRE, JAKE SLAYTON, JAMES B. CHAPPEL, ROSE MARY WILLIAMS, ERNESTINE BECKMAN, MELVIN TULL, DUANE HEFNER, JAN METZ, GIL KENNON, ED WOLFE, ELLEN MOORE, BETTY WILLIAMS, DENISE FUNDERBURK, WENDELL CULLY, LORENE REINSCH, MARY ANN KALLASH, SHARON JAMES, PAUL H. OWINGS,	)	(Filed Jan. 8, 1993)

GERALDEAN THORNSBERRY, and EDWARD L. HARRIS,	)	No. CV193-19CC
Plaintiffs,	)	Div 1
vs.	)	A-37
JOHN ASHCROFT, individually and in his official capacity as Governor of the State of Missouri, and	)	
RAYMOND WAGNER, individually and in his official capacity as Director of Revenue of the State of Missouri,	)	
Defendants.	)	

PETITION

Come now plaintiffs, by and through their attorneys, pursuant to Rules 87 and 92 of the Missouri Rules of Civil Procedure, and as and for their cause of action against defendants, state and allege that:

PARTIES

1. Plaintiffs are at all times material hereto individual citizens of the state of Missouri, and reside in different and various counties throughout the state.

2. Defendant John Ashcroft is at all times material herein the duly elected and acting Governor of the state of Missouri. He maintains an office and residence within Cole County.

3. Defendant Raymond Wagner is at all times material herein the duly appointed and acting Director of the Missouri Department of Revenue. He maintains an office and residence within Cole County.

JURISDICTION AND VENUE

4. This Court has jurisdiction of this matter, and venue is proper in this Court by reason of the fact that defendants reside in and may be found in Cole County, and this is in part an action to declare the rights of parties to contracts with the Director of the Missouri Department of Revenue, as more fully hereinafter appears.

FACTS APPLICABLE TO ALL COUNTS

5. Plaintiffs are all acting fee agents of the Missouri Department of Revenue. Plaintiffs have entered into written agreements with the Director of the Missouri Department of Revenue.

6. The current form of the agreement is attached hereto, marked Exhibit 1, and is incorporated herein by this reference as if more fully set out.

7. Plaintiffs are duly and ably performing their obligations under the fee agent contracts without any misfeasance or malfeasance.

8. On or about November 3, 1992, Lt. Governor Mel Carnahan, a Democrat, was elected Governor of the state of Missouri. He shall formally assume his office and duties on January 11, 1993.

9. It has heretofore been the practice and custom in Missouri for newly elected Governors to appoint a Director of Revenue upon taking office, and to provide the new Director of Revenue with the names of supporters of the new Governor for appointment as fee agents. In other words, the position of fee agent was treated as a political patronage position.

10. Most if not all of the plaintiffs are Republicans.

11. On plaintiffs' information and belief, the newly elected Governor intends to seek the termination of plaintiffs' contracts as fee agents and to replace them with his own political allies and supporters.

12. Article I, Sections 8 and 9 of the Missouri Constitution provide in pertinent part as follows:

> "Section 8. Freedom of speech – evidence of truth in defamation actions – province of jury.
>
> "That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject. . . . "
>
> "Section 9. Rights of peaceable assembly and petition.
>
> "That the people have the right peaceably to assemble for their common good. . . . "

13. The first amendment to the United States Constitution provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble. . . .

14. The first Amendment is applicable to the various states and the acts of defendants pursuant to the Fourteenth Amendment to the United States Constitution.

COUNT ONE

(Action for Declaratory Judgment)

15. Any action taken by defendants or their successors in office to replace or interfere with plaintiffs in the performance of their duties as fee agents for the Missouri Department of Revenue on the basis of plaintiffs' political affiliation or on political patronage grounds would constitute an impermissible and unlawful burden on plaintiffs' rights of free speech and free association as guaranteed by Article I, Sections 8 and 9 of the Missouri Constitution and would have a chilling effect on the rights of all Missouri citizens.

16. There is therefore a controversy or uncertainty over plaintiffs' rights to continue in their service as fee agents.

17. The Court should resolve the controversy or uncertainty and determine the rights of the parties under the fee agent contracts.

WHEREFORE, plaintiffs pray the Court to make and enter its order and judgment, declaring that plaintiffs are protected from the termination of or interference with their fee agent contracts with the Director of the Missouri Department of Revenue on the basis of plaintiffs' political affiliation or on political patronage grounds by Article I, Sections 8 and 9 of the Missouri Constitution; at defendants' costs; and for such other and further orders as the Court deems proper.

COUNT TWO

(Action for Declaratory Judgment)

18. Any action taken by defendants or their successors in office to replace or interfere with plaintiffs in the performance of their duties as fee agents of the Missouri Department of Revenue on the basis of plaintiffs' political affiliation or on political patronage grounds would constitute an impermissible and unlawful burden on plaintiffs' rights of free speech and free association as guaranteed by the First and Fourteenth Amendments to the United States Constitution and have a chilling effect on the rights of all Missouri citizens.

19. There is therefore a controversy or uncertainty over plaintiffs' rights to continue in their service as fee agents.

20. The Court should resolve the controversy or uncertainty and determine the rights of the parties under the fee agent contracts.

WHEREFORE, plaintiffs pray the Court to make and enter its order and judgment, declaring that plaintiffs are protected from the termination of or interference with their contracts with the Director of the Missouri Department of Revenue on the basis of plaintiffs' political affiliation or on political patronage grounds by the First and Fourteenth Amendments to the United States Constitution; at defendants' costs; and for such other and further orders as the Court deems proper.

COUNT THREE

(Action for Declaratory Judgment)

21. Following the 1980 election for Governor in the state of Missouri, then-Governor Bond appointed a new Director of Revenue who in turn began to terminate the fee agent contracts of certain fee agents and replace them with persons familiar with or loyal to Governor Bond.

22. Some of the fee agents whose contracts were terminated by the Director of Revenue challenged the termination of their contracts in court on the grounds that the terminations violated rights of free speech and free association as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

23. The courts denied the challenges, and based their denials on the premise that the fee agents were then more in the nature of independent contractors than employees because the Department of Revenue exercised relatively little control over the fee agents' operation of their offices.

24. There have been several modifications to the form of the fee agent contract since 1982, by which the Department of Revenue has incrementally and systematically asserted substantial control over the fee agents' operation of their offices, so that the court rulings from the early-1980's challenges to the terminations of the fee agents' contracts are no longer relevant to controlling over the current fee agent contract.

25. A partial, non-exhaustive listing of the changes made to the basic fee agent contract since 1982 by which the Department of Revenue has asserted greater control

over the fee agents' operation of their offices is as follows:

(a) the Director may set the hours of operation for the office (1987 revision, §2A);

(b) the Director may require the fee agent to undergo seven days training (1985 revision, §6);

(c) the Director may require the fee agent's chief deputy to undergo training (1987 revision, §11);

(d) the Director now requires the fee agent *and his or her spouse* to sign the contract, and waive the confidentiality of their tax records (1987 revision, §11);

(e) in 1988, the State Auditor began to regularly audit the fee offices and issue detailed critiques of performance;

(f) in mid-1987, the Director promulgated a disciplinary policy with penalties ranging from reprimand to termination;

(g) the Director has been empowered to inspect the fee office operations and records at any time (1987 revision, §4);

(h) In early 1988, Field Representatives of the Department of Revenue were given increased authority over the fee agents, with authority to seize materials and close offices;

(i) the Director has instituted an inventory maintenance policy, and under certain circumstances excuses the fee agent from liability for inventory loss;

(j) the Director now requires prior approval of any signs used in the fee office (1987 revision, §10);

(k) the Director has forbidden advertising by individual fee agents, and now only permits collective advertising in *trade areas* defined by the Director (1989) revision §16);

(l) the Director has been empowered to set fee office security guidelines and to approve any electronic security systems (1987 revision, §2-8);

(m) fee agents are precluded from using the services of lobbyists in the General Assembly without the prior approval of the Director (1989 revision, §15);

(n) the Director has been empowered to inspect *private papers* of the fee agents in the office (1987 revision, §5-B);

(o) the Director sets standards for the acceptance of checks in payment of fees (1987 revision, §2-K); and

(p) fee agents are required to disclose all office employees, their addresses and social security numbers (1987 revision, §2-C).

26. As a result of the changes in the fee agent contract, fee agents are now more akin to regular employees and should be considered state employees for the limited purpose of protection from the termination of their fee agent contracts on the basis of their political affiliation or on political patronage grounds under the Missouri and Federal Constitutions.

27. Plaintiffs deny that the performance of their duties as fee agents ever constituted inherently political

activity, but to the extent their activities ever might have been political in part, the changes in the nature of the fee agent contract and the relationship between the fee agents and the Department of Revenue have removed politics from the position.

28. Developments in the law have also eroded the foundation of the early-1980's rulings, notably the United States Supreme Court's decision in *Rutan vs. Republican Party of Illinois,* 110 S.Ct. 2729 (1990). *Rutan* held that adverse personnel actions against most categories of state employees – even short of termination – violate the constitutional guaranties of free speech and free association.

29. There is therefore a controversy or uncertainty over plaintiffs' right to continue in their service as fee agents.

30. The Court should resolve the controversy or uncertainty and determine the rights of the parties under the fee agent contracts.

WHEREFORE, plaintiffs pray the Court to make and enter its order and judgment, declaring that plaintiffs are state employees for the limited purpose of protection from the termination of or interference with their fee agent contracts on the basis of plaintiffs' political affiliation or on political patronage grounds under Article 1, Sections 8 and 9 of the Missouri Constitution and the First and Fourteenth Amendments to the United States Constitution; at defendants' costs; and for such other and further orders as the Court deems proper.

COUNT FOUR

(Action for Injunctive Relief)

31. Plaintiffs are protected from the termination of or interference with their positions as fee agents on the basis of their political affiliations or on political patronage grounds, by their rights of free speech and free association as guaranteed by Article I, Sections 8 and 9 of the Missouri Constitution and the First and Fourteenth Amendments to the United States Constitution.

32. Plaintiffs shall be irreparably harmed in the event their positions are terminated or interfered with on the basis of their political affiliation or on political patronage grounds.

33. Defendants and their successors in office should be permanently enjoined from terminating or interfering with plaintiffs' positions as fee agents on the basis of plaintiffs' political affiliation or on political patronage grounds.

34. Plaintiffs do not have an adequate remedy at law.

WHEREFORE, plaintiffs pray the Court to make and enter its order and judgment, permanently enjoining defendants and their successors in office from terminating or interfering with plaintiffs' positions as fee agents on the basis of plaintiffs' political affiliation or on

political patronage grounds; at defendants' costs; and for such other and further orders as the Court deems proper.

ANDERSON, GILBERT & GARVIN

by: /s/ Leo V. Garvin, Jr.

Leo V. Garvin, Jr.
Craig A. Sullivan
7800 Forsyth Boulevard,
6th Flr
St. Louis, Missouri 63105
(314) 721-2777

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

DAVID B. COURTWAY, et al., Plaintiffs, vs. JOHN ASHCROFT, individually and in his official capacity as Governor of the State of Missouri, et al., Defendants.	)	No. CV193-19CC Division 1

AMENDMENT BY INTERLINEATION TO PETITION BY SUBSTITUTION OF PARTY-DEFENDANT

(Filed Jan. 15, 1993)

Come now Plaintiffs and, by leave, amend their Petition to substitute Mel Carnahan as Party-Defendant in place of John Ashcroft. Mel Carnahan is named as Party-Defendant in both his individual capacity and in his status as Governor of the State of Missouri.

Respectfully submitted,

ANDERSON, GILBERT & GARVIN

by: /s/ Leo V. Garvin, Jr.
Leo V. Garvin, Jr. #20505
Craig A. Sullivan #27697
7800 Forsyth Boulevard, 6th Flr
St. Louis, Missouri 63105
(314) 721-2777

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

DAVID B. COURTWAY, et al., Plaintiffs,	)	No. CV193-19CC
vs.	)	
MEL CARNAHAN, et al., Defendants.	)	Division 1

AMENDMENT BY INTERLINEATION TO PETITION BY SUBSTITUTION OF PARTY-DEFENDANT

(Filed Aug. 16, 1993)

Come now Plaintiffs and, by leave, amend their Petition to substitute Janette M. Lohman in place of Raymond Wagner. Janette M. Lohman is named as Party-Defendant in both her individual capacity and in her status as Director of Revenue of the State of Missouri.

Respectfully submitted,

ANDERSON, GILBERT & GARVIN

by: /s/ Leo V. Garvin, Jr.

Leo V. Garvin, Jr. 20505
Craig A. Sullivan 27697
7800 Forsyth Boulevard, 6th Flr
St. Louis, Missouri 63105
(314) 721-2777

Attorneys for Plaintiffs

Supreme Court, U.S.
FILED
MAY 28 1999
CLERK

No. 99-1721

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1998

DAVID B. COURTWAY, et al.,
Petitioners,

v.

MEL CARNAHAN, et al.,
Respondents.

On Petition For A Writ of Certiorari to the Missouri Court of Appeals, Western District

RESPONDENTS' BRIEF IN OPPOSITION

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor

MICHAEL L. BOICOURT*
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321

**Counsel of Record*
ATTORNEYS FOR RESPONDENTS

1788

QUESTION PRESENTED

This case raises the same issue decided in *Sweeney v. Bond*, 519 F. Supp. 124 (E.D.Mo. 1981), *aff'd* 669 F.2d 542 (8th Cir. 1982), *cert. denied* 459 U.S. 878 (1982): Whether political affiliation is an appropriate requirement for the effective performance of the duties undertaken by the fee agents who are appointed by each Director of Revenue on recommendation of the Governor, and who represent the Governor and the Director in cities and towns throughout the State.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD NOT BE GRANTED 7

I. The key questions posed by the petition go to a holding by a Missouri appellate court as to Missouri law and to a finding of fact -- neither of which is an important question of federal law that merits this court's attention. 7

II. Review of the Missouri Court of Appeals decision by this Court would not have general application to other potential litigants 9

III. The Missouri Court of Appeals applied the test established by this Court in a manner that does not conflict with the decisions of any other courts 11

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Branti v. Finkle, supra, 445 U.S. at 517, 100 S.Ct. at 1294 . . . . . 4-6, 9-12

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 29 L.Ed.2d 547 (1976) 12

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed. 2d 874 (1996) 13

Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed. 2d 52 (1990) 12, 13

Sweeney v. Bond, 519 F. Supp. 124, (E.D.Mo. 1981), *aff'd* 669 F.2d 542 (8th Cir. 1982), *cert. denied* 459 U.S. 878 (1982) 2, 3

Sweeney v. Bond, 669 F.2d 542 (8th Cir. 1982) 2

Statutes

Mo. Rev. Stat. §136.055 (1994) 1, 2

Respondents, Mel Carnahan, Governor of the State of Missouri, and Jeanette M. Lohman, Director of the Missouri Department of Revenue, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Missouri Court of Appeals, Western District, in this case. That opinion is reported at 985 S.W.2d 350 (Mo. App. 1999), and is reprinted in the Petition Appendix at App. 1-12.

STATEMENT OF THE CASE

Petitioners have correctly outlined the procedural history of this case. But their characterization of the opinion of the Missouri Court of Appeals, Western District, has been truncated and is incomplete. After citing the Missouri statute that references Department of Revenue fee agents, Mo. Rev. Stat. §136.055 (1994), the Missouri Court of Appeals, Western District concluded that under Missouri law, fee agents can and do perform duties beyond those specified in the statute:

> [I]f the duties of a fee agent were strictly limited to those stated in §136.055, political affiliation would not be an appropriate requirement for the effective performance of the position. However, we disagree with the applicants that we are limited to the statutory duties in §136.055 to determine whether political affiliation was an appropriate requirement for the effective performance of the position of a fee agent.
>
> . . . .
>
> . . . In this respect, §136.055 does not limit the duties of a fee agent to those expressly stated therein. In addition, there are no statutes which prohibit fee agents from performing other duties not expressly contained in §136.055. In fact,

> the record reflects that the position of fee agent has historically encompassed many duties not expressly contained within §136.055. These additional duties were recognized and discussed in *Sweeney v. Bond*, 519 F. Supp. 124 (E.D.Mo. 1981).

Petitioners chose to omit any discussion of the substantial factual record on which the court below relied. That omission could mislead this Court because this matter turns on a unique set of facts -- facts that must be used in the analysis required by the patronage test. A limited recitation of the facts appears in the opinion of the Missouri Court of Appeals. App. 2-4. But the facts are more fully explained in prior federal court decisions.

This case, which arose from a change in party affiliation of the governor in 1993, was not the first in which former Missouri fee agents have attempted to bring their claims to this Court. The last time that the party affiliation of the Governor of Missouri changed was in 1981. Some of the fee agents who were replaced at that time sought the same relief that petitioners have sought in this case -- but they did so in federal, rather than in state court. *See Sweeney v. Bond*, 519 F. Supp. 124, (E.D.Mo. 1981), *aff'd* 669 F.2d 542 (8th Cir. 1982), *cert. denied* 459 U.S. 878 (1982). There were actually three separate cases, decided by three different United States district court judges -- and the State prevailed in all three. *See* 669 F.2d at 544, n.2. The only reported district court decision demonstrates that the courts understood the unique nature of fee agents.

The U.S. District Court for the Eastern District of Missouri explained the "novel status of motor vehicle license fee agents" and how the Missouri statute "supports the argument that the State interest in having such an unusual arrangement is an intentional and planned circumstance,

designed to meet and overcome the shortcomings of most patronage assignments." *Sweeney v. Bond*, 519 F. Supp. at 130. The court went on to explain the job of a fee agent:

> The fee agents have more than five million contacts with the public during their term and do serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimized the usual deficiencies of patronage.
>
> First of all, there is little or no additional cost to the government, for the fees of the agents are simply added to the costs of the licenses and taxes, thus allowing the state the full and complete measure of it taxing bounty.
>
> Second, any citizen wanting to avoid the agent's small fee can seek out a branch office or utilize the mails to pay the license fees and taxes without paying the $1.00 fee. He may have to forego the convenience of location or scheduled availability, but that would be a luxury that he could judge the value of and accept or decline.
>
> Third, the requirements for filling the position of fee agent are simple and generic, no special skill or professional knowledge is needed, and thus large numbers of individuals could easily qualify for the posts with little difficulty in completing the work required.

> Fourth, while not requiring the confidential and policymaking function of the top-level positions in state government, there is the responsibility of demonstrating loyalty, efficiency and partisan pride, which could be interpreted as a hallmark of the incumbent administration.
>
> Fifth, the fee holder can delegate practically all of the chores and responsibility of the office to others that he employs, and thus continue to actively and fully participate in the political activities of his choice without the restriction of a civil service code or the loss of services to the state.
>
> Sixth, the novel status of motor vehicle license fee agents supports the argument that the state interest in having such a unusual arrangement is an intentional and planned circumstance, designed to meet and overcome the shortcomings of most patronage assignments.
>
> In summary, then, the fee agents are extraordinarily suited for partisan, political appointment, and may well be a near perfect example of the kind of role suggested in *Branti [v. Finkle, 445 U.S. 507 (1980)]*.

519 F. Supp. at 129-130.

The displaced fee agents next took their case to the U.S. Court of Appeals for the Eighth Circuit. With a record before it that did not differ materially from the record in this case, the Eighth Circuit described fee agents and the political nature of their duties and responsibilities in light of this Court's precedents:

In *Branti v. Finkle, supra*, 445 U.S. at 517, 100 S.Ct. at 1294, the Court stated that "*Elrod* recognize[d] that party affiliation may be an acceptable requirement for some types of government employment." The burden is on the hiring authority to "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518, 100 S.Ct. at 1294. We believe defendants in this case have carried their burden.

The district court held that party affiliation was an appropriate requirement for the position of fee agent because fee agents

> serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimizes the usual deficiencies of patronage.

Sweeney v. Bond, supra, 519 F.Supp. at 129.

Fee agents are not required to work in their offices. They are free to delegate duties of the offices to workers hired by the fee agent. Thus fee agents can continue to actively participate in political activities free of their restrictions of a civil service code and without

> interruption of service to the fee agency. There is no cost to the government of the fee agents' service as the cost is borne by the customer. There are 158 fee agent offices in Missouri, the vast majority of which are now operated by Democrats; in 1980 there were over 4.5 million transactions between fee agents and citizens of Missouri. Fee agents are traditionally looked upon as representatives of the incumbent governor. Many spend much of their time in this way and are not restricted in their active pursuit of party politics by the confines of their fee agent offices. We hold that political affiliation is an appropriate requirement of the effective performance of fee agents and has been so regarded by both Democrats and Republicans for many years.

669 F.2d at 546.

During the trial of this case, respondents conclusively demonstrated that all of the facts relied on by those courts in 1981 remain true with respect to the petitioners and the circumstances existing today. That proof is reflected, albeit in summary form, in the decision of the Missouri Court of Appeals. The existence and persuasiveness of the proof is perhaps best shown by petitioners' decision not to address it in their petition, and their decision to argue instead that this Court should grant the petition in order to hold that the Missouri Court of Appeals incorrectly interpreted Missouri law regarding the permissible scope of duties assigned to or assumed by fee agents.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The key questions posed by the petition go to a holding by a Missouri appellate court as to Missouri law and to a finding of fact -- neither of which is an important question of federal law that merits this Court's attention.

Petitioners' argument may be summarized in three sentences: (1) The duties of fee agents are statutorily "limited to the sale of licenses and collection of taxes, as an agent of the department of revenue" (Pet. at 7-8) and cannot be enlarged by the governor or the Director of the Missouri Department of Revenue (Pet. at 8-12). (2) Fee agents, as independent contractors, have protection against "partisan dismissals." Pet. at 5-6. (3) The State cannot invoke the exception to that protection because it did not prove that political party affiliation makes a fee agent "better able to sell motor vehicle licenses and collect motor vehicle sales and use taxes." Pet. at 6-7. Petitioners' argument fails at the outset, for the duties of fee agents are *not* limited to the sale and licenses and collection of taxes.

Petitioners effectively rest their entire argument on the claim that the Missouri Court of Appeals misinterpreted Missouri law in analyzing the duties and responsibilities of fee agents. They argue that the activities of fee agents are circumscribed by the statutory description of the licenses that they issue and the fees and taxes that they collect. But the question of the scope of duties assigned to or assumed by fee agents is solely an issue of state law. There is no reason why this Court should accept review of this case in order to question how a Missouri appellate court interprets Missouri law establishing a position that extends the reach of the Missouri Governor into dozens of locations throughout the state.

Dedicating nearly their entirely argument to an attack on the holding that under Missouri law fee agents can act outside the narrow confines of their statutory mandate, petitioners ignore the findings below (and the findings in prior cases) that fee agents do have a broader roles. In the real world, divorced from the simplicity of black print on the white page of the Revised Statutes of Missouri, fee agents are not merely license issuers and license and tax gatherers. Petitioners implicitly concede that fee agents are a governor's "ambassadors . . . at the grass roots." Pet. App. at 24. To obtain relief from this Court, then, petitioners would have to either reverse course and attack the findings below, or continue down the path of arguing that this Court must reverse a state court holding that under Missouri law an independent contractor who *actually performs* a broad, political role, cannot be displaced by an incoming governor because that performance was beyond the scope of the statute authorizing the contract. Nothing in the petition suggests a rationale for such a step.

Again, Petitioners' argument rests on a state law dispute, *i.e.*, whether Missouri law permits fee agents to have a broader role than the statutes on their face authorize. That is not a federal question, much less an "important federal question." Sup. Ct. Rule 10(a). And whether fee agents actually do have such a broad role is a factual question that petitioners do not even attempt to attack. Petitioners' arguments for certiorari, resting as they do on the inaccurate premises that the fee agents' duties are and must be limited to those in the statute, must fail.

II. Review of the Missouri Court of Appeals' decision by this Court would not have general application to other potential litigants.

To decide whether political affiliation is an appropriate requirement for the duties of Missouri Department of Revenue fee agents, the Missouri courts inquired into the unique nature of the fee agent institution as it exists in the State of Missouri and into the duties actually performed by these independent contractors. The need for such an inquiry is unusual in Missouri; though political affiliation plays a role in the appointment of fee agents, that generally is not true for state contractors, nor for state employees. But more important here, petitioners have not even suggested, much less shown, that there exists, in Missouri or in any other state, a group of independent contractors or public employees who are appointed under similar circumstances, have similar duties and responsibilities, or have traditionally been treated or defined similarly to the petitioners. They have failed to show that this case has any significance beyond the realm of fee agents who were appointed when one party took over in 1983 and wanted to keep those appointments after another party took power in 1993.

The factual circumstances relating to fee agents are unique and peculiar. The unusual responsibilities that have been placed upon fee agents do not have a factual corollary in Missouri or, as far as we know, elsewhere.

Fee agents are appointed by the Director of Revenue upon recommendation of the governor. They provide, among other things, state motor vehicle and drivers' licenses at locations throughout the State. They do so for a fee over and above the license price or tax charged by the Missouri

Department of Revenue. Under Missouri law, the fee agents are entitled to keep that fee as their compensation.

But as concluded by every court to look at the issues presented here, the role of a fee agent does not end with selling licenses or collecting taxes. Fee agents are, and have always been, the governor's political representatives in the geographic areas in which the fee agents serve. *See, e.g., Sweeney*, 519 F. Supp. at 129; 669 F.2d at 546; Petition App. at 20-25. They represent the incumbent governor at the grass roots. Political affiliation, therefore, has always been an important criterion for their selection.

Each of the petitioners had their contract as a Department of Revenue fee agent terminated, after the administration of Governor Mel Carnahan, a Democrat, and his appointed Director of Revenue, began in January 1993. Each of the petitioners is a Republican who was appointed during the 1980's under the administrations of former Governors Christopher S. Bond and John Ashcroft, both Republicans. Petitioners could be appointed as fee agents only because the contracts of the previous fee agents in their communities had been terminated based upon political considerations. These circumstances follow a long-standing pattern and practice with respect to fee agents. Political affiliation "has been . . . regarded" as appropriate requirement for the effective performance of fee agents "by both Democrats and Republicans for many years." *Sweeney v. Bond*, 669 F.2d at 546.

Again, petitioners do not identify any comparable group of public employees or independent contractors in Missouri or in any other state. Therefore, review by this Court would be extremely unlikely to affect other potential litigants. The narrow impact of the decision to be reviewed argues strongly against granting the petition.

III. The Missouri Court of Appeals applied the test established by this Court in a manner that does not conflict with the decisions of any other courts.

The question in this case always was whether political affiliation was an appropriate requirement for the effective performance of the duties of fee agents. Petitioners implicitly admit that the Missouri courts used the appropriate test to answer that question, but explicitly argue that those courts nevertheless incorrectly determined that fee agents fit within the exception established by that test. The Missouri courts' finding that political affiliation is an appropriate requirement for a fee agent is not, however, in conflict with the line of cases that establishes the standard for reviewing patronage dismissals -- a line of cases that requires a fact-intensive study of the nature of the position or contract involved. Nor does it conflict with prior decisions in other courts considering the same or comparable facts.

In neither the proceedings below nor the history of the prior, related cases is there any hint that the decision below was incorrect. Sixteen judges have now reviewed the unique status of fee agents, and not one has concluded that political affiliation is not an appropriate requirement for the duties of those fee agents. Three United States district court judges considered the question in 1981, though only one of those opinions was officially reported. *Sweeney v. Bond*, 519 F.Supp. at 129-130. In 1982, three judges of the United States Court of Appeals for the Eighth Circuit considered it and affirmatively concluded that political affiliation is an appropriate requirement for fee agents. *Sweeney v. Bond*, 669 F.2d at 546. In this case, the trial judge reached the same conclusion, Petition App. 15-34, and three judges on the Missouri Court of Appeals agreed, Petition App. 1-12. After separate briefs and argument en banc

before seven judges, the Missouri Supreme Court implicitly approved that conclusion by retransferring this case to the Court of Appeals for issuance of the opinion and mandate. Petition App. 43.

Petitioners' claim that those judges were all wrong, and that there is a conflict with federal law, relies, again, on frequent reiterations of their claim that a fee agent cannot perform duties other than those specified in the statute, and on brief ridicule of the role of a fee agent as "Goodwill ambassador of the Governor." Pet. at 10-11. Though the petition refers to the evolution of the law regarding dismissals of employees and contractors for partisan political reasons, it fails to identify an error or conflict that merits this Court's review.

Petitioners' recitation of the law begins in 1976, when, for the first time, this Court determined that public employees were not universally subject to termination on the basis of their political beliefs. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 29 L.Ed.2d 547 (1976). In *Elrod*, this Court listed as exceptions from its general patronage prohibition in public employment only policy-making employees and employees serving the appointing authority in a confidential capacity. Four years later in *Branti v. Finkle*, 445 U.S. 507, 100 S.Ct. 1287, 630 L.Ed. 2d 574 (1980), this Court determined that an assistant public defender's retention could not properly be conditioned on his allegiance to a particular party. There, however, the Court clarified the standard for analyzing the validity of patronage terminations of public employees:

> [T]he ultimate inquiry is not whether the label 'policy maker' or 'confidential' fits a particular position, [but] rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for

> effective performance of the public office involved.

445 U.S. at 519.

In 1990, this Court extended its line of patronage decisions to include hiring, promotions, and transfers. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed. 2d 52 (1990). But even there, the issue was clearly stated in terms of the legal standard established by *Branti*. The Court held that "promotion, transfer, recall or hiring decisions involving public employment positions *for which party affiliation is not an appropriate requirement* should be prohibited." 497 U.S. at 68 (emphasis added). Again, the Court excluded what the courts below found here: positions for which party affiliation *is* an appropriate requirement.

Finally, in 1996 the Court applied the prohibition against patronage practice to some independent contractors. *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed. 2d 874 (1996). But even there, this Court began by reaffirming the *Branti* test, *i.e.*, by recognizing that political affiliation may be a reasonably appropriate requirement of the job in question. 116 S.Ct. at 2357. Thus, after *O'Hare* both employees and independent contractors can still be displaced because of their political affiliation *if* affiliation is an appropriate requirement, given the nature of the work being performed.

Despite their recitation of the case law, petitioners do not suggest that the courts below chose the wrong standard. They merely claim that the Missouri courts erred in applying that standard to the peculiar institution of Missouri Department of Revenue fee agents. They point to no decision by any court, considering positions at all comparable to those of Missouri's

fee agents, with which the decision of the Missouri Court of Appeals even arguably conflicts.

Again, the petition ultimately rests on an alleged error in a Missouri court's holding that fee agents can, under Missouri law, do more than sell licenses and collect taxes. That is not a question of federal law that merits review.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor

MICHAEL L. BOICOURT*
Assistant Attorney General
Missouri Bar No. 20840
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

**Counsel of Record*

Attorneys for Respondents